84-1516

No.

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In the

Supreme Court of the United States

OCTOBER TERM 1984

MARIO MARTINEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

THIS IS A CASE OF FIRST IMPRESSION IN THIS COURT AND THERE ARE NO OTHER CIRCUIT COURT CASES ON THE PRECISE ISSUE.

1. Did the District Courts err in failing to hold hearings on Defendant's Motion to Suppress evidence seized from him at the time of this arrest and then admitting that evidence on the theory that in the first of two trials the evidence was used only for impeachment and the legality of its seizure was irrelevant under the doctrine of *United States* v. *Havens,* 446 U.S. 620 (1980) and *Harris* v. *New York,* 401 U.S. 111 (1977), when in fact the evidence was used as direct evidence to prove the charge?

2. Did Defendant's admission, in the first trial, of possession of the seized evidence obviate the necessity of a hearing on the motion to suppress because the admission somehow justified the seizure?

3. Even if the evidence seized was usable in the first trial, was it not used prejudicially for the purpose of proving the commission of an offense by proof of a later offense?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Authorities Cited	iii
Opinion Below	1
Jurisdiction	2
Statement of the Case	2
Argument	
I. THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURTS BELOW FAILED TO HOLD HEARINGS ON DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE SEIZED FROM DEFENDANT WITHOUT HIS CONSENT AND THEN ADMITTED SAID EVIDENCE.	4
II. EVIDENCE OF A LATER CRIME SEIZED FROM DEFENDANT AND USED TO PROVE THE COMMISSION OF CRIMES ALLEGED TO HAVE OCCURRED OVER EIGHT MONTHS EARLIER WAS FUNDAMENTALLY UNFAIR AND DEPRIVED DEFENDANT OF A FAIR TRIAL.	8
Conclusion	11
Appendix	1a

AUTHORITIES CITED

PAGE

Agnello v. *United States,* 269 U.S. 20 (1925) 5, 7

Harris v. *New York,* 401 U.S. 111 (1971) 6

Simmons v. *United States,* 390 U.S. 377 (1976) 7

United States v. *Havens,* 446 U.S. 620 (1980) 6, 7

United States v. *Daniels,* 572 F.2d (5th Cir., 1978) 10

United States v. *Gamble,* 437 F.2d (7th Cir., 1973) 7

United States v. *Jimenez,* 613 F.2d 1373 (5th Cir., 1980) 10

United States v. *Powell,* 587 F.2d 443 (9th Cir., 1978) 9

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MARIO MARTINEZ,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, MARIO MARTINEZ, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit affirming judgments of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The judgments of the Court of Appeals are in an order not reported but printed in the appendix to this Petition. It will never be reported because the Seventh Circuit indulged its own local rule 35 and called it an

"unpublished order" which "shall not be cited or used as precedent. . . ." For reasons stated below it is clear that the Seventh Circuit violated its own guidelines for publication, which provide for publication when, *inter alia*, the opinion established a new rule.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1984. A timely Petition for Rehearing was denied on January 7, 1985 (appendix). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

A. Defendant was first indicted for various offenses alleged to have occurred between April 13, 1982, and September, 1982.

In June 1983, Defendant was arrested, a dance hall owned by Defendant was searched and a pound of cocaine was seized. It is the seizure of that cocaine which was contested by Defendant's Motions to Suppress.

If the evidence in the first trial on behalf of the government were to be believed (and the jury did), Defendant arranged sales through a third person in April and then in August made a direct sale to an undercover Drug Enforcement Administration Agent. During that period of time and into September Defendant offered to obtain kilogram quantities of heroin and opium. (The actual sales were relatively small, .45 gram and two ounces of unrefined opium which was supposed to be heroin and 84.1 grams of heroin which was a low 3.6% purity. There never were any large kilogram sales of narcotics.)

If the evidence presented on behalf of Defendant were to be believed, he knew of transactions between the agent and the third person but he did not participate, and the evidence of the government did not show participation. He did not participate in any August transaction. There never were any large kilogram sales of narcotics although the DEA agent was always asking him to get large quantities. He went along with the agent at the request of his co-defendant, but he did not participate.

In the first trial, over objection by the Defendant, the government was allowed to produce before the jury the pound of cocaine which was seized from the dance hall and to question the Defendant as to whether it was in his possession in June, 1983, and whether he tried to sell it to the agent, which Defendant admitted.

The government thus far has argued successfully that the admission of such testimony was proper under Rule 404(b), Federal Rules of Evidence, to probe the direct issue of Defendant's intent and knowledge and under Rule 613, Federal Rules of Evidence, as collateral impeachment material. The District Court refused to hold a hearing on Defendant's motion to suppress the evidence which was the basis for the questioning of Defendant and which was introduced in rebuttal.

B. Defendant was also indicted for possession of the cocaine in June, 1983. A motion to suppress the evidence seized was made. The District Court did not hold any hearing on Defendant's motion but instead held the evidence admissible because of Defendant's admission made in the first trial. Thus, no determination was ever made as to the legality of the seizure of the evidence which formed the *corpus deliciti* of the crime charged.

ARGUMENT

I. THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURTS BELOW FAILED TO HOLD HEARINGS ON DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE SEIZED FROM DEFENDANT WITHOUT HIS CONSENT.

A. The Seventh Circuit side-stepped most of the issues raised by Defendant and generally categorized under this illegal evidence caption. For instance, we argued in the District Court and also in the Court of Appeals that the use of the evidence in the first trial, although purporting to be impeachment, was also used as direct evidence to support the government's theory of the case.

The Seventh Circuit in its unpublished order agreed with the government "that the cocaine transaction was admissible under Rule 404(b), Federal Rules of Evidence, to show the Defendant's motive, opportunity, intent, and absence of mistake." But the Seventh Circuit muddled the analysis of that direct evidence with impeachment material by asserting that Defendant "specifically denied on cross-examination and on direct examination that he had a source of multi-ounce quantities of drugs. . . ."

That statement by the Seventh Circuit is just not based on anything in the record: Defendant *never* on direct examination testified that he did not have a source for multi-ounce quantities of drugs (it is obvious from the later cross-examination that he did, and he readily admitted it, although it pertained *not* to the times of the

crimes alleged in the indictment for which Defendant was then on trial, but to June 1983, testimony which we contend was erroneously and prejudicially admitted). *And* on cross-examination the only thing he denied was that it was not his testimony that he never had a source for any multi-ounce quantities of narcotics, although that was interpreted, erroneously, to mean that he denied having a source for multi-ounce quantities of narcotics. In either event, the government "smuggled in" the impeaching opportunity on cross-examination (See *Walder* v. *United States*, 347 U.S. 62 (1954), commenting on *Agnello* v. *United States*, 269 U.S. 20 (1925).

That the government's position that the later seizure was direct evidence that Defendant was a bad man is obvious from the argument to the jury indulged by the prosecutors:

> And then even the testimony about the cocaine was consistent with that common thread, that common theory, because in September this Defendant again was saying "I need some more money from you so I can get down to Mexico and get some more opium", and the way he was going to do that was by selling some cocaine. And this cocaine is here, real as life, right in front of you. (Opening argument, TR1. 369.)
>
> I submit to you that what that bag (cocaine) proves is that the Defendant was capable of supplying the large quantities that he had been promising for over a year, for one reason or another, and he told you he couldn't get the front money, and that's been the consistent theme, he couldn't get the opium he promised, but he got the cocaine. (Rebuttal argument TR1. 384)

Consequently, the use of the extrinsic evidence of subsequent wrongdoing, designed to be substantive evidence and not merely impeachment, was subject to the tests of legality.

> "[A Defendant] must be free to deny all the elements of the case against him without thereby giving leave to the government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its use in chief." *Walder* v. *United States,* 347 U.S. 62, 65 (1954).

If the evidence was illegally seized it could not be used for rebuttal or the direct use to which it was put in the first trial.

Nonetheless, the Seventh Circuit called the introduction of the cocaine a matter of impeachment and therefore a permissible area of inquiry and proof without regard to legality, under the doctrine of *United States* v. *Havens,* 446 U.S. 620 (1980) and *Harris* v. *New York,* 401 U.S. 111 (1971). As has been pointed out, the prosecutors argued otherwise and the court instructed the jury that the evidence could be considered as direct evidence and not merely impeaching evidence.

B. Needless to say, if the cocaine were not legally seized it could not have been used to prove the *corpus delecti* of the later indictment, the possession of June 2, 1983.

In a pronouncement that defies all logic the Seventh Circuit said: "Once the Defendant has admitted possession of the cocaine it is unnecessary to determine the validity of the search in order to admit the cocaine in the second action."

Prosecutors at one time had the marvelous tool of being able to use as admissions in a later trial Defendant's statements made during an earlier motion to suppress, such as the claim of interest in the seized property or a claim of possession. *Simmons* v. *United States,* 390 U.S. 377 (1976) resolved the dilemma into which that paradox placed a Defendant and held that the use of the Fourth Amendment right could not be used to waive the Fifth Amendment right not to have compulsory self-incrimination. Conversely, the Defendant here is now in the position of having admitted something and that admission being construed as a waiver of the Fourth Amendment right to be free from illegal searches and seizures.

Defendant did nothing to waive his constitutional protection or to justify cross-examination and rebuttal evidence in respect to the cocaine seizure. *Agnello* v. *United States,* 269 U.S. 20 (1925). Defendant's motion to suppress the cocaine in the first trial should have been heard.

C. The government had the burden of proving that the evidence obtained in a warrantless search was legally obtained. *United States* v. *Gamble,* 473 F.2d 1274 (7th Cir., 1973). Here, the District Courts held no hearings, the first because of a mistaken application of *United States* v. *Havens,* 446 U.S. 620 (1980) and the second because it felt, erroneously, that any seizure had been attenuated by Defendant's admission in the first trial.

It is respectfully submitted that Defendant was entitled to be heard on his motions to suppress the statements made and the seizure of cocaine made at the time of his arrest on June 2, 1983.

II. EVIDENCE OF A LATER CRIME SEIZED FROM DEFENDANT AND USED TO PROVE THE COMMISSION OF CRIMES ALLEGED TO HAVE OCCURRED OVER EIGHT MONTHS EARLIER WAS FUNDAMENTALLY UNFAIR AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

In the first case that was tried before the District Court and a jury, Defendant was charged with crimes allegedly occurring between April and August, 1982.

The government case was presented through the testimony of one agent. The agent testified that he received opium from co-defendant Garcia on two occasions in April, received heroin on one occasion from Garcia in April (a free sample which was not to be revealed to Martinez) and received a sample of heroin and two ounces of heroin in August from Martinez. The remainder of his testimony concerned efforts to involve Martinez between April and August in large quantities of drugs. There never were any such deliveries or even attempted deliveries.

The agent had trouble remembering dates, changed his testimony from time to time and eventually had to use reports to refresh his recollection. It appeared that the reports testified more than the agent.

The Defendant on his behalf described his solid background, which the government refused to challenge.

In sharp contradistinction to what the agent reported, the Defendant testified that he knew that Garcia (co-defendant) was up to something, that Garcia asked him to go along with the agent, that the agent continually called him after awhile attempting to buy large quantities

of drugs. Defendant told the agent he would look around, but he never did, and deliver large quantities he did not do. Despite all the importunings by the undercover agent there was no delivery of any of the large quantity of drugs which the agent and the Defendant said the agent sought. Defendant did not deliver any drugs to the agent in April. What was *done* in April was *done* by Garcia. What was *said* was sharply contested. As to the alleged August transaction, Defendant denied narcotic transactions although the agent approached him.

On cross-examination, the government laid a foundation for using the transaction of June 1983 (over nine months after the matter alleged in the indictment), and Defendant admitted his possession.

It is respectfully submitted that this procedure is fundamentally unfair because it supposes that an event that occurs later in time means that a person had knowledge earlier. Knowing something today could be taken logically to say that one knows something tomorrow but not yesterday.

In *United States* v. *Powell,* 587 F.2d 443, 449 (9th Cir., 1978), the government used subsequent and prior similar acts to achieve conviction for possessing marihuana with intent to distribute and conspiring with others to do likewise. As to the prior acts, the court held:

> The only logical connection between the two marihuana incidents was that a person who had shown a willingness to deal in large quantities of marihuana in one circumstance may be willing to deal in large quantities of marihuana in another. In short, this is the same forbidden use of the prior conviction.

In *United States* v. *Jimenez,* 630 F.2d 1373, 1977 (5th Cir., 1980), involving the alleged possession by Defendant of cocaine at the time of his arrest on the heroin charge for which he was on trial, the Court observed:

> For its limited probative value, evidence of the subsequent offense posed too great a risk of improper jury decision on the basis of appellant's character or propensity to commit drug-related offenses.

The only way to assure that the jury decides the case at hand and not the case a year later is to prevent such irrelevant later-date evidence, particularly where there has been a significant lapse of time and/or logical connection between the acts. In this case the subsequent possession of the cocaine did not grow out of any prior scheme between Garcia and Defendant, for which Defendant was on trial. Rather, the possession grew out of the government agent's request that Defendant obtain large quantities of narcotics. It was not, therefore, a logical development of an existing plan. As to amount, type of drug or persons involved, it was as logically dissimilar as the sawed-off shotgun evidence in *United States* v. *Daniels,* 572 F.2d 535 (5th Cir., 1978).

Under Rule 403, Federal Rules of Evidence, which the District Court used for justifying the testimony, there are certain predicates:

1. That the evidence is relevant;
2. That its probative value substantially outweighs the danger of unfair prejudice, confusion of the issue or misleading the jury.

What was said to the jury was extremely confusing:

> You can take into consideration the fact that at a later date he did have some knowledge, he did have

> some intent to sell, in determining whether he knowingly participated on the earlier date, but you cannot find that he was a knowing participant in the sale of heroin because in June he participated, or apparently participated, in the sale of cocaine, or that in April—he knowingly participated in the sale of some morphine-based opium simply because he sold some cocaine later. But that's relevant to whether or not he had knowledge and intent with respect to the sale of narcotics, not whether he sold those particular narcotics back there in April and June of 1982.

The converse, that because one knows something today, has no logical reverse sequence, saying that he also knew yesterday. The vice of allowing evidence of tomorrow's knowledge to prove yesterday's knowledge should be obvious.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the judgments and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 7, 1985

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, District Judge*

Nos. 83-2818,
83-3065

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MARIO MARTINEZ,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 CR 431

HUBERT L. WILL, *Judge;*

No. 83 CR 439

GEORGE N. LEIGHTON, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Defendant-Appellant Mario Martinez, all of the judges on the original panel having voted to deny the same,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William J. Campbell, Senior Judge of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(ARGUED MAY 30, 1984)

September 13, 1984.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

No. 83-2818
83-3065

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MARIO MARTINEZ,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois,
Eastern Division.
No. 82 CR 431
HUBERT L. WILL, *Judge*
No. 82 CR 439
GEORGE N. LEIGHTON, *Judge.*

ORDER

Defendant Mario Martinez was indicted on May 31, 1983 by a grand jury for conspiring with Tony Garcia to possess with intent to distribute and to distribute mixtures containing opium and heroin in violation of 21

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* The Honorable William J. Campbell, Senior Judge of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

U.S.C. § 846 and three counts of unlawful distribution of mixtures containing opium and heroin in violation of 21 U.S.C. § 841(a)(1). On June 14, 1983, a different grand jury indicted the defendant for conspiring with Libarado Saavedra-Escobar to possess with intent to distribute and distribute mixtures containing cocaine in violation of 21 U.S.C. § 846 and for possessing 500.8 grams of a mixture containing cocaine in violation of 21 U.S.C. § 841(a)(1). Following a jury trial on the opium charges, the defendant was convicted and sentenced to three years incarceration followed by three years special parole on one count, fined $10,000 on a second count, and given four years consecutive probation on the two remaining opium counts. After a stipulated bench trial on the cocaine charges, the defendant was convicted and sentenced to three years incarceration consecutive to the opium sentence, and an eight year special parole term. This consolidated appeal followed.

I

On April 13, 1982. Tony Garcia, an employee at the Viking Lounge, 4325 W. Fullerton, Chicago, gave Juvenal Mendoza, a confidential informant for the Drug Enforcement Administration, approximately .45 grams of 19% morphine base opium as a free sample. On April 14, DEA Agent Leo Arreguin, assuming the undercover identity of a heroin purchaser named Polo, went to the Viking Lounge with Mendoza, who introduced him to Garcia. Garcia told Arreguin that the price for the same type of "heroin" given to Mendoza would be $850 per ounce. On the same day, Mendoza introduced Arreguin to Mario Martinez, who was also at the Viking Lounge. On August 20, 1982, Arreguin met Martinez alone at the Rio Rosa Restaurant, 3565 W. Fullerton, Chicago, where Martinez gave Arreguin 84.1 grams of 3.6% heroin. After inspecting the heroin, Arreguin gave Martinez $1,900. Martinez then said he would call when he could arrange a larger delivery.

Between April 14, and August 20, 1982, Arreguin, Martinez, ano Garcia met on numerous occasions to negotiate a deal for Arreguin's purchase of large quantities of opium and heroin. During a meeting on May 25, 1982, between Arreguin and Martinez, the two discussed Martinez's Mexican opium source. Martinez also asked Arreguin to accompany him to Mexico City and wait there while Martinez obtained opium from his source in Jalisco. Martinez also told Arreguin that he had a source with a ready supply of heroin at $36,000 per kilo for up to five kilograms.

During September 1982, Martinez discussed with Arreguin a source that he had who could supply Arreguin with large quantities of high quality cocaine, of which Martinez said that he could secure a couple of kilograms that day. Following several meetings regarding the purchase of cocaine, Arreguin met Martinez on June 2, 1983 to purchase cocaine. Arreguin eventually seized 500.8 grams of 86% cocaine, and the defendant was arrested.

During the trial on the opium charges, Martinez testified on his own behalf. Martinez denied knowing about any opium sales by Garcia to Arreguin, and denied giving Arreguin a heroin sample and selling him two ounces in August 1982. Martinez did admit to meeting Arreguin in August 1982, but denied any heroin transactions. Martinez admitted to receiving $500 from Arreguin about a month and a half after meeting him.

On cross-examination, Martinez denied all specific statements regarding delivery, price, and advancing funds which Arreguin and another witness attributed to him. Martinez also denied knowing that Arreguin could speak Spanish, even though Arreguin testified that many of his conversations with Martinez were in Spanish. Martinez also denied ever having a source for multi-ounce quantities of narcotics of any kind. After this denial, the prosecution requested that the court, over the defendant's objection, allow the prosecution to confront

Martinez with the half kilo of cocaine seized from him on June 2, 1983. The government argued that it would use the cocaine to impeach Martinez's testimony that he had no source for large quantities of drugs. The court overruled the defendant's objection. When confronted with the seized cocaine, Martinez admitted that he was going to sell that particular cocaine to Arreguin for $30,000 on June 2, Tr. at 279.

At a stipulated bench trial on the cocaine charges, the district court concluded that Martinez's admission on cross-examination in the opium trial regarding his ownership of the cocaine was admissible in the government's case in chief in that trial. The district court further concluded that the cocaine itself was admissible so that the court could fully understand the scope and context of the defendant's admission in the opium trial. Because of these rulings, the district court found it unnecessary to rule on the defendant's motion to suppress the cocaine on the basis of it being the fruit of an illegal seizure.

II

The defendant first challenges the government's use of the cocaine transaction to impeach Martinez's testimony in the opium trial. During a pretrial conference, the government advised the court that it wished to introduce the cocaine transaction to rebut the defendant's announced entrapment defense. In denying the government's request to use the cocaine transaction in such a way, the court advised the parties:

> I don't permit that kind of evidence to go in in the Government's case in chief, [but] I permit it to go in only if the defendant takes the stand and denies knowledge of or participation in conduct of the kind charged in the indictment, in which event I permit the Government to use it as rebuttal. . . .

Tr. 5.

Because Martinez took the stand and denied that he had a source for multi-ounce quantities of drugs, the government contends that it properly sought to admit the cocaine as impeachment of his denials of the kind of conduct charged in the indictment. The government specifically contends that the cocaine transaction was admissible under Rule 404(b), Federal Rules of Evidence, to show the defendant's motive, opportunity, intent, and absence of mistake. The government also contends that the cocaine transaction was admissible under Rule 613 as a prior inconsistent act impeaching his statements on the stand denying any sources for large quantities of drugs. We agree.

During cross-xamination, the government properly laid its foundation for the introduction of the cocaine to impeach Martinez:

> Q. Sir, it is your testimony you never had a source for any multi-ounce quantities of narcotics?
> A. No, sir.
> Q. Of any kind?
> A. No, sir.

Tr. at 262.

The government then sought the court's permission to cross-examine the defendant regarding the June 2, 1983 transaction in which he was arrested in possession of a pound of 86% pure cocaine. Following a sidebar conference with the court on the admissibility of the cocaine as impeachment, the government continued its questioning of the defendant as follows:

> Q. Sir, . . . [h]ave you ever seen this pound of cocaine before?
> A. Yes, sir.
> Q. This is your cocaine, isn't it, sir, Government Exhibit called "Cocaine?"
> A. Yes, sir.
> Q. This is cocaine you had up at the Rio Rosa Restaurant in June of 1983?

A. Yes.

Q. And, sir, your testimony previously — and, again, it was your cocaine, isn't that correct?

A. Well, it wasn't my cocaine. It's —

Q. Well, you got it — it was in your possession, wasn't it, sir?

A. Yes, sir.

• • •

Q. Sir, you did negotiate with Agent Arreguin to sell this to him for $30,000, this pound of cocaine, didn't you?

A. Yes, sir.

Q. And that's the same Agent Arreguin whom you claim you did not negotiate for any heroin sales prior to that, is that correct?

A. That's correct.

Tr. at 279-81.

Evidence of offenses extrinsic to the charges before the court is admissible if it is relevant to an issue other than the defendant's character and the evidence's probative value is not substantially outweighed by undue prejudice. *United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). To determine whether the government's cross-examination was proper, we must examine whether the evidence was admitted in order to prove that Martinez acted in conformance with other acts, an improper line of inquiry under F.R.E. 403(b), or whether the cocaine transaction was used to show motive, opportunity, intent, or some proper purpose under F.R.E. 403(b). Here, the cocaine transaction was properly admitted as evidence to show that the defendant had a source of large quantities of narcotics, and thus was useful under Rule 403(b) to show an opportunity or knowledge which he had denied on cross-examination. Because Martinez had specifically denied on cross-examination and on direct examination that he had a source for multi-ounce quantities of drugs, that testimony could properly be impeached by inquiring about

the cocaine transaction. *United States* v. *Fairchild,* 526 F.2d 185, 188-89 (7th Cir. 1975), *cert. denied,* 425 U.S. 942 (1976).

Defendant contends that even if properly admitted for impeachment purposes, the court nonetheless should have held a suppression hearing to determine whether the cocaine was the fruit of an illegal search and seizure. We disagree It is well settled that evidence obtained in violation of the fourth amendment remains admissible for impeachment purpose even though it must be excluded from the government's case in chief. *United States* v. *Havens,* 446 U.S. 620, 627-28 ((1980); *Walder* v. *United States,* 347 U.S. 62, 65 (1954); *United States* v. *Rippy,* 606 F.2d 1150, 1155 (D.C. Cir. 1979). *Accord Harris* v. *New York,* 401 U.S. 111, 115 (1971) (Statements by defendant received in violation of *Miranda* may be used to impeach defendant's trial testimony if evidence is otherwise trustworthy.)

III

Martinez also appeals his conviction on the cocaine charges on the assertion that the court's use of his testimony on cross-examination in the opium case was improper. The defendant asserted in both cases that the seizure of the cocaine was illegal and therefore inadmissible. Martinez claims that because the cocaine was obtained in violation of his fourth amendment rights, no subsequent statement by the defendant cures that illegality. We find this claim without merit.

The admission of the cross-examination testimony from the opium trial was clearly admissible in the cocaine trial under Rule 801(d)(2)(A). Federal Rules of Evidence. "[A] defendant's testimony at a former trial is admissible in evidence against him in a later proceeding." *Harrison* v. *United States,* 392 U.S. 219, 222 (1968). Moreover, the court did not have to hold a suppression hearing on the cocaine to admit it into evidence. Once the

defendant has admitted possession of the cocaine, it is unnecessary to determine the validity of the search in order to admit the cocaine in the second action. *Young* v. *Maryland*, 455 F.2d 679, 680 (4th Cir.), *cert. denied*, 407 U.S. 915 (1972).

IV

For the above stated reasons, both convictions on this appeal are affirmed.

AFFIRMED.